IJM Construction Sdn Bhd v Cleveland Development Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-1) 22–105 OF 1998
SYED AHMAD HELMY JC
15 MAY 2002

Civil Procedure *— Appearance — Unconditional appearance — Whether a party to an arbitration agreement entitled to refer dispute to arbitration when it has entered unconditional appearance — Whether a 'dispute' existed for referral of the matter to arbitration which the parties contractually made provision under the construction contract*

The defendant sought a stay of all further proceedings in this action and a reference of the dispute to arbitration on the grounds that the parties herein had by cl 34(1) of the construction contract ('the construction contract') agreed to refer the dispute or difference to arbitration. The reference to arbitration initiated by the defendant was vehemently opposed by the plaintiff on the ground that the defendant has forfeited its rights to have the matter referred to arbitration by an entry of unconditional appearance by reason of the express provision of s 6 of the Arbitration Act 1952 ('the Act'). The issues for determination hence were: (i) whether a party to an arbitration agreement was entitled to have the dispute referred to arbitration in accordance with s 6 of the Act where it had entered an unconditional appearance; and (ii) whether there was a 'dispute' for the referral of the matter to arbitration which the parties had contractually made provision under cl 34 of the construction contract.

Held:

(1) Where a party sought to avail himself of a contractual provision of referring the matter for arbitration, he was not denying the court's jurisdiction, for parties could not by contract oust the jurisdiction of the courts but merely agreeing that either party should not utilize the forum of the court until a third person in the form of an arbitrator had decided on the difference that arose between the parties. How else could the party refer the matter to arbitration without first availing himself of the courts jurisdiction to stay the matter and the nature of appearance be it conditional or unconditional could not and did not in any way jeopardize his right to have the matter referred to arbitration pursuant to the statutory provision of s 6 of the Act (see pp 524H–525A); *Trans Resources Corporation Sdn Bhd v Sanwell Corp & Anor* [1999] 2 MLJ 609 followed.

(2) The entry of an unconditional appearance by the defendant herein did not and could not amount to a step in the proceedings to deprive the defendant of his recourse to refer the dispute to arbitration as provided for by s 6 of the Act (see p 525D–E).

(3) The principle established in *Usahabina* and *Interscope* only applied in the limited situation where the defendant is not challenging the jurisdiction of the court or if he is not objecting to any irregularities in the issue or service of the writ as in all other situations the conditional appearance stand for all purposes as a complete appearance (see p 522H–I); *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691 and *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 distinguished.

(4) Upon perusing the various affidavits filed and the exhibits filed and the exhibits annexed thereto the court had come to the conclusion that there was a dispute within the meaning of cl 34(1) of the construction contract which warranted the court to grant a stay for referral of the matter to arbitration. The second and third requirement of applying for stay and that the defendant was ready and willing to do all things necessary for the proper conduct of the arbitration had been fulfilled and proven respectively by the defendant and the plaintiff had consequently failed to convince the court of sufficiency of reasons not to refer the matter to arbitration (see pp 527E, 528D); *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 followed.

[Bahasa Malaysia summary

Defendan memohon penangguhan bagi kesemua prosiding yang selanjutnya di dalam tindakan ini dan satu rujukan pertikaian tersebut kepada timbangtara atas alasan bahawa pihak-pihak di sini telah melalui fasal 34(1) kontrak pembinaan ('kontrak pembinaan tersebut') bersetuju untuk merujuk pertikaian atau perbezaan tersebut kepada timbangtara. Rujukan kepada timbangtara yang dimulakan oleh defendan telah dibantah dengan kerasnya oleh plaintif atas alasan bahawa defendan telah melucut hak mereka kepada perkara yang dirujuk kepada timbangtara melalui satu kemasukan kehadiran tanpa syarat akan peruntukan nyata s 6 Akta Timbangtara 1952 ('Akta tersebut'). Isu-isu untuk penentuan adalah dengan itu sama ada sesuatu pihak kepada perjanjian timbangtara berhak untuk merujukkan pertikaian tersebut kepada timbangtara menurut s 6 Akta tersebut di mana ianya telah memasukkan kehadiran tanpa bersyarat dan sama ada terdapatnya satu 'dispute' untuk rujukan perkara tersebut kepada timbangtara yang mana pihak-pihak tersebut telah secara kontraktual membuat peruntukan di bawah fasal 34 kontrak pembinaan tersebut.

Diputuskan:

(1) Di mana sesuatu pihak cuba untuk menggunakan dirinya untuk satu peruntukan kontraktual bagi merujuk perkara tersebut untuk timbangtara beliau tidak menafikan bidang kuasa mahkamah kerana pihak-pihak tersebut tidak boleh melalui kontrak

menyingkir bidang kuasa mahkamah tetapi hanya bersetuju bahawa mana-mana satu pihak tidak seharusnya menggunakan forum mahkamah tersebut sehingga orang ketiga dalam bentuk penimbangtara telah membuat keputusan atas perbezaan yang berbangkit antara pihak-pihak tersebut. Bagaimana boleh pihak tersebut merujuk perkara itu kepada timbangtara tanpa pertamanya menawarkan dirinya kepada bidang kuasa mahkamah untuk menangguhkan perkara tersebut dan sifat kehadiran hendaklah bersyarat atau tidak bersyarat dan tidak dalam apa cara pun memudaratkan haknya untuk merujuk perkara tersebut kepada timbangtara selaras dengan peruntukan statutori s 6 Akta tersebut (lihat ms 524H–525A); *Trans Resources Corporation Sdn Bhd v Sanwell Corp & Anor* [1999] 2 MLJ 609 diikut.

(2) Kemasukan suatu kehadiran tanpa bersyarat oleh defendan di sini tidak dan tidak boleh membawa kepada satu langkah di dalam prosiding di sini untuk melucut hak defendan untuk berpaling bagi merujuk pertikaian tersebut kepada timbangtara sepertimana yang diperuntukan oleh s 6 Akta tersebut (lihat ms 525D–E).

(3) Prinsip yang ditetapkan di dalam *Usahabina* dan *Interscope* hanya terpakai dalam situasi terhad di mana defendan tidak mencabar bidang kuasa mahkamah atau jika beliau tidak membantah kepada mana-mana luar aturan di dalam isu tersebut atau penyampaian writ sepertimana dalam kesemua situasi yang lain kehadiran bersyarat kekal untuk kesemua tujuan sebagai kehadiran yang lengkap (lihat ms 522H–I); *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691 dan *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529 dibeza.

(4) Setelah meneliti pelbagai afidavit yang telah difailkan dan ekshibit-ekshibit yang dilampirkan padanya, mahkamah telah mencapai kesimpulan bahawa terdapatnya satu pertikaian di dalam lingkungan maksud fasal 34(1) kontrak pembinaan tersebut yang mana mewajarkan mahkamah untuk memberikan satu penggantungan untuk merujuk perkara tersebut kepada timbangtara. Syarat kedua dan ketiga untuk memohon bagi mendapatkan penggantungan dan bahawa defendan adalah sesungguhnya bersedia dan rela untuk melakukan segala perkara yang perlu untuk pengendalian sempurna akan timbangtara tersebut telah dipenuhi dan terbukti masing-masingnya oleh defendan dan plaintif telah akibatnya gagal untuk meyakinkan mahkamah ini mengenai cukupnya alasan untuk tidak merujuk perkara tersebut kepada timbangtara (lihat ms 527E, 528D); *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 diikut.]

Notes

For cases on unconditional appearance, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1287–1293.

Cases referred to

Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd [1998] 4 MLJ 497 (refd)

Carmel Exporters (Sales) Ltd v Sea-Land Services Inc [1981] 1 All ER 984 (refd)

Henry v Geopresco International Ltd (1975) 3 WLAR 620 (refd)

Heyman v Darwins Ltd (1942) AC 356 (refd)

Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd [1999] 2 MLJ 529 (distd)

Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (refd)

Oriental Wealth (M) Sdn Bhd v Nakano (M) Sdn Bhd [2001] 3 MLJ 6 (refd)

PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd [1999] 6 MLJ 1 (refd)

Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd [1991] 3 MLJ 309 (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (folld)

Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim At Pat (t/a Juta Bena) [1995] 3 MLJ 273 (refd)

Trans Resources Corporation Sdn Bhd v Sanwell Corp & Anor [1999] 2 MLJ 609 (folld)

Usahabina v Anuar bin Yahya [1998] 7 MLJ 691 (distd)

Legislation referred to

Arbitration Act 1952 s 6

Rules of the High Court 1980 O 14, O 81

Shanmugaraj CT Pillai (*Ngae, Shan, Kalai & Co*) for the plaintiff.
Johanan A Puthucheary (*Kuok & Puthucheary*) for the defendant.

Syed Ahmad Helmy JC: By a summons in chambers in encl 8 the defendant sought a stay of all further proceedings in this action and a reference of the dispute to arbitration on the grounds that the parties herein had by cl 34(1) of the construction contract ('the construction contract') dated 26 September 1997, exhibited as 'LKF 1' in encl 7, agreed to refer the dispute or difference to arbitration. The dispute that the defendant contends attracts the arbitration clause, relates to the defectiveness of the water proofing system, which the defendant contends has deteriorated to such an extent so as to be a 'total failure'.

Clause 34(1) of the construction contract provides as follows:

> In the event that any dispute or difference should arise between the employer or architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to any matter or thing of whatsoever nature arising hereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may

claim to be entitled or the measurement and valuation mentioned in cl 39(5)(a) of these conditions or the rights and liabilities of the parties under cll 25, 26, 31 or 32 of these conditions), then such disputes or differences shall be referred to arbitration.

The reference to arbitration initiated by the defendant was vehemently opposed by the plaintiff on the ground that the defendant had forfeited their right to have the matter referred to arbitration by an entry of unconditional appearance on 4 April 1998 by reason of the express provision of s 6 of the Arbitration Act 1952 ('the Act').

It is the plaintiffs submission that the entry of an unconditional appearance by the defendant amounted to a 'step in the proceedings' and relied on the High Court decision of *Usahabina v Anuar bin Yahya* [1998] 7 MLJ 691 ('*Usahabina*') and the Court of Appeal decision in *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529.

Section 6 of the Act reads as follows:

Power to stay proceedings where there is submission to arbitration

If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The issue for determination, hence, was whether a party to an arbitration agreement was entitled to have the dispute referred to arbitration in accordance with s 6 of the Act where it had entered an unconditional appearance.

The issue came up for determination in *Usahabina* where Augustine Paul JC (as he then was) held that a defendant must enter a conditional appearance as opposed to an unconditional appearance to have the matter referred to arbitration.

A close scrutiny revealed that *Usahabina* laid down the proposition that an applicant who sought to object to: (i) the jurisdiction of the court; and/or (ii) to any irregularity in the issue or service of the writ must enter a conditional appearance.

It should be observed that Augustine Paul JC (as his Lordship then was) in *Usahabina*, in ruling that an unconditional appearance is a waiver of any irregularity and a submission to the jurisdiction of the court, adopted the decision of Robert Goff J in the case of *Carmel Exporters (Sales) Ltd v Sea-Land Services Inc* [1981] 1 All ER 984 which laid down the two courses opened to a party who wished to challenge the jurisdiction of the court. He may, with the leave of court, enter conditional appearance, as this will have the effect of preventing the plaintiff from entering judgment in default of

A appearance, whilst at the same time, maintaining his right to object to the jurisdiction of the court or to object to any irregularities in the issue or service of the writ. Robert Goff J went on to say that subject to the right to object to the jurisdiction of the court or to object to any irregularities in the issue of the service of the writ, a conditional appearance was a complete appearance to the action for all purposes.

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The ratio aforesaid in *Usahabina* was affirmed by the Court of Appeal in *Interscope* where Gopal Sri Ram JCA stated at p 534:

> Section 6, however, makes no such qualification. It would appear from the judgment of Augustine Paul JC, that the decisions of Malaysian Courts that held the entry of an unconditional appearance not to amount to a step in the
C proceedings did so by acting upon English cases without properly appreciating that the two provisions (s 6 of the [1952 Arbitration] Act and s 4(2) [Arbitration Act 1950] of the United Kingdom statute) are differently constructed.

Before evaluating the facts and the applicability of the principles established
D in the two cases aforesaid, it is prudent to remind ourselves of the well settled principle of law that parties cannot by contract oust the jurisdiction of the courts. As was stated by Gopal Sri Ram JCA in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim At Pat (t/a Juta Bena)* [1995] 3 MLJ 273 at pp 278–279:

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> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary court. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate. However, the court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligations voluntarily undertaken to go to
F arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a court which has none, there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants.

Coming back to the evaluation of the facts appearing in *Usahabina* and *Interscope*, it is clear that there are several material differences from the facts
G herein, which differences would exclude the applicability of the principles so established.

In *Usahabina*, the facts revealed that the plaintiff filed in their writ on 13 May 1997 and effected service a month later — on 13 June 1997, whenafter the defendant filed in his unconditional appearance on 19 June
H 1997. The defendant who was supposed to file in their defence by 3 July 1997 did not do so but requested for one week's extension which was accommodated to by the plaintiff. However, upon failure by the defendant to file in the defence within the extended period, the plaintiff entered judgment in default on 15 July 1997, and a copy was served on the defendant on 31 July 1997. In the interim, on 25 July 1997, the defendant
I wrote to the plaintiff and informed them that they wished to refer the dispute to arbitration as they had just become aware of the arbitration agreement. The defendant thereupon filed an application on 6 August 1997

seeking, inter alia, to set aside the judgment, stay/referral of matter to arbitration and alternatively leave to issue third party proceedings. A

From the facts aforesaid, it can be seen that his Lordship Augustine Paul's decision was predicated by not only the time lapse before applying for stay but also the peculiarity of the necessity of bringing in a third party which peculiarity must have been a very weighty factor which led his Lordship to the conclusion that he did. In this respect, his Lordship Gopal Sri Ram JCA held in *Tan Kok Cheng* that this was one area where the court could exercise its discretion in not granting a stay as third party proceedings could not be ordered by an arbitration. B

Similarly in *Interscope*, the facts revealed that the defendant filed an unconditional appearance to the plaintiff's claim and the defendant's application for stay was only filed two weeks after the plaintiff's summons for judgment and hence predicated by the similarity of the chronological facts the Court of Appeal was moved to affirm the principles propounded in *Usahabina*. C

Turning to the facts herein, the following salient features reveal the dissimilarity with *Usahabina* and *Interscope*. The chronology showed that upon being served with the writ on 30 March 1998 and before entry of appearance on 4 April 1998, the defendant had through their solicitor's letter of 3 April 1998 intimated their intention to refer the matter for arbitration. D

The defendant then proceeded to file in their application for stay on 20 April 1998 which was a straightforward application for stay under s 6 of the Act without any other prayers, such as leave to issue third party proceedings. E

By reason of the dissimilarities in the fact situation, it behoves upon me to adopt a cautious approach in applying the principles established by the Court of Appeal decision in *Interscope* which leads me to hold that the distinguishing features herein do not attract the application of the principle so established. F

I am of the view that the facts herein would fall within the dicta in *Trans Resources Corporation Sdn Bhd v Sanwell Corp & Anor (No 2)* [1999] 2 MLJ 609 where it was held at p 622 that: G

> the entering of an unconditional appearance cannot amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiff's filing of the civil suit herein does not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action it has not been the first defendant's contention that the court has no jurisdiction to deal with the dispute. H

Thus, from the authorities aforesaid, it becomes crystal clear the principle established in *Usahabina* and *Interscope* only applies in the limited situation where the defendant is not challenging the jurisdiction of the court or if he is, not objecting to any irregularities in the issue or service of the writ as in all other situations the conditional appearance stands for all purposes as a complete appearance. I

A In short, where the defendant herein is seeking to have the dispute referred to arbitration in accordance with cl 34(1) of the agreement, it is clearly a case of not challenging the jurisdiction of the court nor objecting to any irregularities in the issuance or service of the writ for any conditional appearance to have any useful purpose.

B Thus, viewed in that perspective, the conclusion that in *Usahabina* 'where the appearance is conditional it does not amount to a submission to the jurisdiction of the court', would not only be flawed as the vesting of jurisdiction on the High Court to hear disputes concerning construction contracts, must necessarily preclude a defendant from entering conditional appearance.

C The rationale that a party seeking a stay and eventual reference to arbitration must enter conditional appearance or be found guilty of taking a step in the proceedings, is, with due respect to his Lordship Augustine Paul, misguided and I say this because there are ample authorities to the contrary to the effect that a conditional appearance could amount to a submission to the jurisdiction — see para 12/7/4 Supreme Court Practice 1979 Ed Vol 1 ('the White Book'); *Henry v Geopresco International Ltd* (1975) 3 WLAR 620; *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* [1999] 6 MLJ 1.

D Thus, it follows that a party who may not be challenging the court's jurisdiction or objecting to any irregularities in the issue or service of the writ must necessarily enter an unconditional appearance as only by entry thereof can he apply for stay to seek the exercise of the court's discretion in his favour to refer the dispute under the agreement to arbitration. To deprive the defendant of availing himself of an entry of unconditional appearance in such circumstances would be most unjust and prejudicial more so when the wording of s 6 of the Act does not in any way prohibit the plaintiff who has initiated writ action and hence 'a step in the proceedings from referring the matter to arbitration. A closer examination of s 6 with particular emphasis on the highlighted portion would make the position clearer:

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> Power to stay proceedings where there is submission to arbitration
>
> If any party to an arbitration agreement [eg the plaintiff] ... commences any legal proceedings against any other party to the arbitration [eg the defendant], ..., in respect of any matter agreed to be referred to arbitration, any party [eg the plaintiff] ... may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, ...

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H From the above it becomes glaringly evident that whilst the first step of the plaintiff is not prejudicial, nevertheless the first step of the defendant in entering unconditional appearance appears to be prejudicial. Though admittedly the plaintiff who initiated the writ action is unlikely to succeed as being unable to satisfy the requirement that he 'was at the time when the proceedings were commenced' and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, nonetheless the point to emphasize is the consequence of the opposite effect on the parties — in that the plaintiff's first step of issuing the writ would not tantamount

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to 'any other steps in the proceedings' to prejudice the plaintiff from applying for stay if he so wishes, it would as against a defendant. A

It must be noted that in respect of an application to enter conditional appearance Practice Direction No 4 of 1980 must be strictly followed. As the issue of bona fide is central to the issue of leave, it follows that if one is unable to challenge the jurisdiction of the High Court and if one is not objecting to any irregularities in the issuance or service of the writ, it will, in all probability, be successfully argued that an application for leave to enter conditional appearance, in such circumstances, is without doubt, baseless and arguably an abuse of process deserving only the swift refusal of the court. B

In this connection, it is pertinent to allude to the case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd* and *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* (which are superior court decisions) which in no uncertain terms established that the High Court was indeed vested with the jurisdiction to hear disputes under the construction contracts. C

The ratio as propounded in the two cases aforesaid was that parties may not by agreement oust the jurisdiction of the courts as it was clear that the High Court was vested with the jurisdiction to hear any dispute under the construction contract in issue. D

In the case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd*, it should be noted, that the court allowed a stay application after the defendant had entered an unconditional appearance to the plaintiff's application under O 81 of the Rules of the High Court 1980. E

In the High Court case of *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459 where the defendant had entered an appearance and appeared before the registrar in the O 14 application, the court was of the view that the defendant cannot be guilty of having taken a step in the proceedings so as to be denied a stay to refer the matter for arbitration. Peh Swee Chin J (as his Lordship then was) stated at p 461: F

> In my judgment, this submission had no merit at all. The appearance before the learned registrar was merely to ask for adjournment on the ground of pending applications for stay of action. G

It should be emphasized that the learned judge allowed the application for stay subsequent to an appearance being entered, though the nature of the appearance being conditional or unconditional was not specified in that case. H

Where a party seeks to avail himself of a contractual provision of referring the matter for arbitration, he is not denying the court's jurisdiction, for parties cannot by contract oust the jurisdiction of the courts by merely agreeing that either party should not utilize the forum of the court until a third person in the form of an arbitrator has decided on the difference that arises between the parties. How else can the party refer the matter to arbitration without first availing himself of the court's jurisdiction to stay the matter and the nature of appearance, be it conditional or unconditional, I

A cannot and does not in any way jeopardize his right to have the matter referred to arbitration pursuant to the statutory provision of s 6 of the Act.

Upon evaluating the case law aforesaid and when viewed in such perspective, the proposition that only an entry of conditional appearance is appropriate cannot be justified and becomes untenable as only through the B entry of an unconditional appearance can he be properly before the court to seek the relief as prescribed by s 6 of the Act.

The entry of an unconditional appearance as such cannot run foul of the phrase 'any other steps in the proceedings' for just as it would exclude the scenario aforesaid of the plaintiff who applies for referral to arbitration after initiation of the writ action, it must correspondingly and necessarily C exclude the first step of the defendant in entering unconditional appearance.

In any event, in the course of writing this judgment, I have been informed by both counsel herein that the issue has been settled with finality by the Federal Court which allowed the appeal and overruled the decision D of the Court of Appeal in *Interscope*. The legal position as established by the apex court of this country is that the entry of an unconditional appearance does not amount to a step in the proceedings within the meaning of s 6 of the Act and a waiver to proceed to arbitration.

For the reasons aforesaid, it is my considered view that the entry of an E unconditional appearance by the defendant herein does not and cannot amount to a step in the proceedings to deprive the defendant of his recourse to refer the dispute to arbitration as provided for by s 6 of the Act.

Having ruled aforesaid, I shall now address my mind to ascertain from the affidavit evidence whether there was a 'dispute' for the referral of the matter to arbitration which the parties had contractually made provision F under cl 34 of the construction contract.

The main ground relied upon by the defendant as appeared in encl 8 was that the dispute that ought to be arbitrated related to the competence and viability of the waterproofing system carried out to the basement of the proposed building therein.

G To support their complaint of defects, the defendant exhibited diagramatic representations of the side elevation of the proposed building prepared by the civil and structural engineer — exh 'LKF 5' in encl 7 and it was the defendant's contention that the plaintiff did not carry out the waterproofing instructions in accordance with the instructions of the civil H and structural engineer as per the letter dated 1 July 1997 — exh 'LKF 5' in encl 7, and by reason thereof, applied waterproofing partially to certain sections of the basement.

The principle regulating reference to arbitration necessitates the fulfillment of three conditions. First, there must a 'dispute' which falls within the terms of the arbitration agreement in question. Secondly, the I defendant must apply for stay of proceedings before taking any other steps in the proceedings — *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 and last but not least is that the defendant must

prove that he is ready and willing to do all things necessary to the proper conduct of the arbitration. Once the above conditions are satisfied, the ball goes to the plaintiff's court to satisfy and convince the court that there are sufficient reasons why the matter ought not to be referred to arbitration.

On the first requirement, the 'dispute' must relate to terms of the agreement and not the very existence of the contract or the arbitration clause — *Heyman v Darwins Ltd* [1942] AC 356.

It is pertinent at this juncture to emphasize the material date for determination on whether a dispute or difference existed was the date of the writ — in this case 5 March 1998 — *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* where Hashim Yeop Sani CJ at p 314 stated:

> In our view, the absence of a developed or full blown dispute or difference at the date of the issue of the writ is not a ground for refusing stay, if the court finds there is a dispute or difference ...

The words 'dispute' or 'difference' is defined in *Black's Law Dictionary* (6th Ed, 1990) as follows:

> 'Dispute': A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim or demand on one side, met by contrary claims or allegations on the other.
>
> 'Difference': In an agreement for submission to arbitration, a disagreement or dispute. As respects contract specifications or material described therein, a state of being unlike. Disagreement in opinion, interpretation or conclusion. Instance or cause of disagreement.

The word dispute was held by his Lordship Hashim Yeop Sani CJ in *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* to mean:

> a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other.

By reason thereof, it is the plaintiff's submission that the words 'dispute' and 'difference' are identical or similar in meaning, ie the plaintiff and defendant hold opposing or opposite views and there was no dispute or difference at the time when the writ was issued warranting referral of the matter to arbitration. The plaintiff's submission of no dispute or difference is predicated by their contention that their claim is founded on an interim valuation certificate — exh LKF-8 in encl 7 which has not been challenged or disagreed to by the defendant as at the date of the writ and the defendant has failed to show any documents in their affidavit disputing the certificate prior to 5 March 1998 or expressly stating that payment on the interim certificate will be withheld or set off against the cost of rectification.

On the defects in the waterproofing system, it is the plaintiff's contention that it has never been challenged nor disputed by the plaintiff and the plaintiff has acted and continues to take remedial action (as it was entitled to under the defect liability period clause) and hence it can never be termed a dispute in the context of cl 34 — the defendant's remedy (if any) can be canvassed at full trial, but for purposes of the application for stay, it

A is a non-issue.

The plaintiff further contended that the defendant failed to give notice as required under cl 34 as at the date of filing of the writ on 5 March 1998 and relying on the Court of Appeal's decision in *Oriental Wealth (M) Sdn Bhd v Nakano (M) Sdn Bhd* [2001] 3 MLJ 6 this court ought not to revise B the amount certified in the Interim Certificate No 10 as any adjustment of the contract sum could only be made by way of revision of the contract sum in the final certificate after settlement of the final accounts.

The defendant, on the contrary, submitted that there was a distinction between the term dispute and difference and relied on the Court of Appeal's case of *Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd* [1998] C 4 MLJ 497 and that what was required of the defendant in an application of like nature was to show the hint of dispute of difference, which dispute or difference had been discharged by the defendant through the defendant's various affidavits and the sequence of documents exhibited therein. The defendant's argument was that since they were questioning the work done D by the plaintiff under the contract, by implication they are also questioning the amount as stated in Interim Certificate No 10 and hence a dispute which falls squarely within cl 34 for the matter to be arbitrated. On *Oriental Wealth*, the defendant contended that the factual matrix herein was different — not only was the clause relating to notice differently worded but there was also evidence relating to the plaintiff's indication to refer the E matter to arbitration, through the letter dated 23 December 1997 addressed to the architects which was exhibited as LKF-21 in encl 7.

Upon perusing the various affidavits filed and the exhibits filed and the exhibits annexed thereto, I have come to the conclusion that there is a dispute within the meaning of cl 34(1) of the construction contract which warrants me to grant a stay for referral of the matter to arbitration. The F various correspondence relating to the contract, and in particular to the waterproofing system as borne out by exhs 9, 10, 11, 18, 19, 22 and 23 in encl 7, together with the joint inspections, the allegation of the plaintiff that the works done had been inspected and accepted by all the parties as against the architect's conclusion that the waterproofing system undertaken was a G 'total failure' and the defendant's contradiction of same and the different standards adopted by the plaintiff and defendant as to what amounted to proper remedial works all goes to show the dispute or difference between the parties for the matter to be referred to arbitration.

The plaintiff's reliance on the Court of Appeal's decision in *Oriental Wealth* cannot be supportive of their contention of no dispute as the factual H matrix herein is different.

It is to be observed that one of the deciding factors in *Oriental Wealth* was the issue relating to the letter of demand by the respondent to the appellant therein, where the appellant failed to show that there was payment or reply or correspondence that notice ceased to be operative, waived or I cancelled. On that score, the court held that the respondent was not required to give prior notice to discontinue negotiations.

The factual matrix herein revealed that there was a letter dated

26 December 1997 from the plaintiff seeking payment and the defendant had responded through its reply dated 29 December 1997 to the effect that it was awaiting advice on the release of payments — see exh LKF-30 — encl 12. Again the factual matrix herein, through the series of on going correspondences indicate the dispute unlike *Oriental Wealth* where the court found that whatever complaints were eventually unsolved to the satisfaction of both parties so as to negative any dispute of crucial importance herein is the exh LKF-21 in encl 7 which is the plaintiff's letter to the architect dated 23 December 1997 wherein they specifically stated in the last paragraph thereof that they 'shall infer the existence of a dispute and shall write to PAM for the immediate appointment of an arbitrator'. Further, by a letter dated 3 April 1998 from the civil and structural engineer to the plaintiff, which is exhibited as LKF-25 in encl 7, it was certified that the whole waterproofing system and the remedial works thereto was a total failure which led to the suspension of the Interim Certificate No 10 under which the plaintiff herein is claiming — see exh LKF-33 in encl 18. The final distinguishing feature is that the wording of cl 34 herein is substantially different from the arbitration cl 43 in *Oriental Wealth*, and in particular to the requirement of a written notice forthwith as found therein.

The second and third requirements of applying for stay and that the defendant is ready and willing to do all things necessary for the proper conduct of the arbitration have been fulfilled and proven respectively by the defendant and the plaintiff has consequently failed to convince this court of the sufficiency of reasons not to refer the matter to arbitration.

By reason of the aforesaid, I accordingly allowed the defendant's application in encl 8 with costs.

Order accordingly.

Reported by Peter Ling